52. Congress legislated a distinction into the Copyright Act that a given representation may be copyrightable as a painting, but not as applied in the context of useful articles—for instance to a body as a tattoo:

> This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

17 U.S.C. § 113(b).

53. That provision has never been construed in the context of tattoos. On the other hand, extensive consideration of its impact has arisen in the domain of architectural works. It is therefore instructive to consider how this provision applies in that realm, and then to bring those considerations to bear insofar as they affect the proper structure of copyright law vis-à-vis tattoos.

54. In brief, the 1909 Act (which applied before the 1976 Act took effect on January 1, 1978) conveyed copyright protection over technical drawings, such as blueprints, but not over structures. Accordingly, courts held that a copyright owner could prevent a third party from making a reproduction of its blueprints, but could not prevent construction of a building based on those blueprints. In copyright parlance, the building was not a "copy" of the blueprints; therefore no copyright could subsist in the building, and, correlatively, the building could not infringe any subsisting copyright (*i.e.*, constitute an infringing "copy").

55. An example of the regnant approach under the 1909 Act is *Muller v. Triborough Bridge Authority*, 43 F. Supp. 298 (S.D.N.Y. 1942), holding that the copyright in a plan for the construction and operation of the Approach to Cross Bay Parkway Bridge did not protect against

the use of that plan in the actual building of the contemplated structure. (For a much lengthier analysis of this complex field, *see* 1 *Nimmer on Copyright* §§ 2.08[D][2], 2.20.)

56. The rule placing buildings outside of copyright protection served U.S. copyright interests until the United States acceded to the Berne Convention in 1989. Because one article of that international treaty requires all member states (such as the U.S.) to afford copyright protection to buildings, Congress decided that it was under an obligation to alter U.S. copyright law. The next year, it therefore enacted the Architectural Works Copyright Protection Act. *See* 17 U.S.C. §§ 101, 120 (1990).

57. A parallel development occurred with respect to computer software. As enacted in 1976, the current Act afforded to software no more protections "than those afforded [under the law as it existed] on December 31, 1977." 17 U.S.C. § 117 (1976). Congress revisited that domain several years later, by passing the Computer Software Copyright Act of 1980. *See* 17 U.S.C. § 117 (1980). (For a complete analysis of this complex field, *see* 2 *Nimmer on Copyright* § 8.08.)

58. The 1980 amendment affecting computer software and the 1990 amendment affecting architectural works both consciously expanded the domain of copyright protection. Before those amendments, copyright owners could vindicate only such rights in software and buildings as subsisted as of 1977.

59. Given that Congress has passed no comparable amendment for tattoos, the copyright status of tattoos, insofar as their making from portrayals thereof is concerned, remains today exactly as it existed in 1977.

60. As of 1977, the applicable Copyright Act listed the categories eligible for copyright registration. 17 U.S.C. § 5 (1909 Act, effective through Dec. 31, 1977). Its

enumeration contained no hint of tattoos. No other provision of the 1909 Act mentioned such protection, either.

61. The further question is whether any provision of copyright law, as of 1977, was "held applicable and construed by a court in an action brought under" the Copyright Act to vindicate copyright protection for tattoos. As of 1977, no case had upheld legal protection for tattoos under U.S. copyright law.

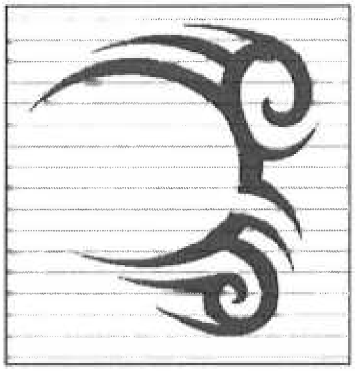
62. Did Congress wish to change that state of affairs by the wholesale substitution of a new Act, which took effect on January 1, 1978? The legislative history of the 1976 Act is voluminous. I possess a compendium of primary materials, edited by George Grossman and published by Heim & Co. It fills seventeen volumes—but even so is non-exhaustive (thus, on occasion, forcing me to search for other primary materials). The material in those volumes begins in 1955, when Congress first contemplated an omnibus revision, and continues through passage of the Act in 1976.

63. In all those seventeen volumes, I cannot locate a single reference to tattoos. The same applies to all the other (uncollected) primary materials that I have reviewed.

64. Tattoos, in short, were not protected via copyright as of 1977, and there is no indication that Congress wished to alter that status when the new law took effect in 1978. By virtue of 17 U.S.C. § 113(b), "the making, distribution, or display" of tattoos from portrayals thereof is therefore not activity that implicates copyright interests.

65. To illustrate concretely the application of section 113(b), let us imagine that plaintiff Whitmill, instead of designing his putatively copyrightable work on another's face, had first put pencil to paper to come up with an appropriate design. What status would result? Figure 7 illustrates.

Figure 7



Prototype of Tyson Tattoo

66. To put these circumstances into the framework enacted by Congress in section 113(b), Mr. Whitmill's hypothetical copyright in Figure 7 would make him "the owner of copyright in a work that portrays a useful article as such." Section 113(b) spells out the contours of his "rights with respect to the making, distribution, or display of the useful article so portrayed." In other words, it defines the contours of Mr. Whitmill's rights to control affixation of that tattoo to other individuals, such as on Ed Helms (the gravamen of the complaint in this case). Specifically, section 113(b) commands that plaintiff Whitmill's rights in that regard be no "greater or lesser . . . than those afforded to such works under the law . . . in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title."

67. In effect, Mr. Whitmill can pursue his cause of action today only if the law in effect on December 31, 1977, accorded him that right. In particular, the subject "law" to which the statute refers must be that "held applicable and construed by a court in an action brought under" the Copyright Act. 17 U.S.C. § 113(b). As previously noted, it is impossible to point to cases arising before or during 1977 that accorded copyright protection to tattoos. That circumstance is fatal to the instant claim.

68. If, contrary to fact, tattoos constituted copyrightable subject matter in 1977, then the applicable provisions of the 1909 Act would have required affixation of a legible copyright notice as a condition for protection. *See generally* 2 *Nimmer on Copyright* chap. 7. In other words, legal rights in tattoos could arise only for tattooists who inked into the skin of their patrons, adjacent to the subject artwork, a visible legend in the form "Copyright 1977 by Victor Whitmill" (or other prescribed alternative). *Id.* It beggars the imagination to posit that custom and practice in the United States, circa 1977, comported with that legal norm. For that reason as well, it is impossible to seriously maintain that the law, as of 1977, accorded copyright protection to tattoos.

69. Lack of copyright protection for tattoos as of 1977 continues to exert fatal consequences through the present. It means that plaintiff Whitmill, even if he had created Figure 7 and therefore qualified as "the owner of copyright in a work that portrays a useful article as such," would still have no right to object to the image being embodied into any other "useful article," *i.e.*, affixed onto a human being (such as Ed Helms).

F. Conclusion

70. For all theses reasons, the count alleging copyright infringement in this case is fatally deficient.

71. For copyright protection in tattoos to arise, Congress would have to act anew, in the manner of its 1980 amendment to the Copyright Act to afford protection to computer software and its 1990 amendment to the Copyright Act to afford protection to architectural works. Congress is always free to adopt a new amendment according protection to tattoos, if it believes such an expansion of copyright law to be necessary to the national well-being. But, to be effective, that amendment would have to pass constitutional muster, which seems highly unlikely for the reasons set forth above.

72. In any event, the Copyright Act as it stands today—not having been amended to expressly grant protection to tattoos—affords no copyright protection to that subject matter. For that reason, plaintiff Whitmill's case fails.

I declare, under penalty of perjury of the laws of the United States, that the foregoing is true and correct.

Executed on May 20, 2011, at Los Angeles, California.

David Nimmer

EXHIBIT A

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